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Supreme Court, U.S
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No. 02- 154

IN THE

Supreme Court of the United States

JOHN SEXTON,

Petitioner,

v.

MIKE KEMNA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition ("Opp.") challenges almost none of the showings made in the petition ("Pet."). Except for arguing—incorrectly—that the posture of this case as a habeas corpus action somehow impedes this Court's review, respondent concedes, expressly or by his silence, that all of the essential elements for certiorari are present. The petition should be granted.

1. Respondent *agrees* (Opp. at 4) that there is a clear, deep, and irreconcilable split among the courts of appeals and state courts of last resort on the issue before the Court—the proper application of the Due Process Clause's presumption of vindictiveness from *North Carolina v. Pearce*, 395 U.S. 711 (1969) where multiple-count indictments are concerned. *See* Pet. at 5-11. Indeed, respondent praises the "thoroug[h] and admirabl[e] research" that demonstrates this national "diversity" in judicial treatment. Opp. at 4.

2. Just as importantly, respondent *offers no response* to petitioner's showing (Pet. at 12-21) that the decision below cannot be reconciled with this Court's decision in *Pearce* and its companion case, *Simpson v. Rice*, which itself applied a rule in a multi-count sentencing case—the "remainder" rule—flatly contrary to the majority decision below. Pet. at 12-13; *Pearce*, 395 U.S. at 726. Respondent's failure to address this aspect of the petition is all the more glaring in view of the single, "vehicular" argument against certiorari that respondent does offer. *See* point 4, *infra*.

3. Likewise, respondent *offers no response* to petitioner's showing (Pet. at 21-22) that the *Pearce* issue presented by the petition is an important and recurring one. Respondent does not (and could not) deny, in view of the current and increasing prevalence of multiple-count indictments and convictions, that this issue is of paramount importance to all federal and state criminal proceedings, all of which are subject to the Due

Process Clause's guarantee that criminal sentences will not be infected by judicial vindictiveness.

4. Respondent, agreeing—as he must—with all of these propositions, offers but one argument against certiorari. He claims that the "diversity among these courts to the question at hand show[s] that reasonable jurists differ about what the correct answer to petitioner's question is" (Opp. at 4), thus demonstrating that the decision below is neither "contrary to" nor "an unreasonable application of" clearly established Federal law as determined by this Court. Opp. at 3-6 (quoting 28 U.S.C. § 2254(d)(1)). This lone argument against certiorari is based on respondent's fundamental misunderstanding of this habeas statute, his misreading of this Court's precedents, and his misrepresentation of petitioner's arguments.

a. The first component of respondent's argument —that the decision of the Missouri Court of Appeals was not "contrary to" clearly established Federal law (Opp. at 3)—is based on both misrepresentation and misunderstanding. Respondent is reduced to claiming that "[p]etitioner concedes in his petition for certiorari that this Court has not ruled on the question that he presents. Pet. at 5, 21." A straightforward reading of pages 5, 21, and indeed all other pages in the petition will disclose no such "concession." Nor would such a "concession" have made any sense in view of petitioner's clear argument that the decision below "conflicts with *North Carolina v. Pearce* and its companion case, *Simpson v. Rice*." Pet. at 12. This Court *has* ruled on the question, and when it did, it "arrive[d] at a conclusion opposite to that reached by" the Missouri Court of Appeals and Eighth Circuit below. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). As petitioner earlier put it (Pet. at 17), "it was not necessary to 'extend' *Pearce* at all to give petitioner relief in this case. All that is necessary is that *Pearce* be applied."

b. The second component of respondent's argument—that the Missouri court's decision did not involve an

"unreasonable application of clearly established Federal law" (Opp. at 3-6)—also fails. *First*, of course, the flat conflict with this Court's decision in *Pearce* and *Simpson v. Rice* means, perforce, that the Missouri decision was unreasonable. *Second*, moreover, respondent's argument—that the split among the circuits and state courts "show[s] that reasonable jurists differ" (Opp. at 4)—is itself flatly contrary to this Court's decisions, which have explicitly rejected respondent's "reasonable jurist" interpretation of 28 U.S.C. § 2254(d)(1)'s "unreasonable application" prong as too vague and subjective:

> The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one.

Williams v. Taylor, 529 U.S. at 409-10; *see also Penry v. Johnson*, 532 U.S. 782, 793 (2001) (noting that the lower court erroneously utilized a "reasonable jurists" standard, which "we later rejected in *Williams*"). Respondent's reliance on the "reasonable jurist" standard rejected in *Williams v. Taylor* is all the more perplexing since that is the single most-cited case in the brief in opposition.

Under any objective standard, the lower court's application of *Pearce* in this case was unreasonable. As explained in the petition (Pet. at 12-21), and above, the Missouri Court of Appeals' affirmance of petitioner's second sentence was (at least) an objectively unreasonable application of this Court's decision in *Pearce*.

c. Respondent claims that this case is unsuitable for review because it arises from a habeas corpus petition and therefore will not allow this Court to establish a governing

legal principle or resolve the split within the courts. Opp. at 5-6. These arguments are also meritless.

Contrary to respondent's implication, this Court did not stop granting certiorari to consider substantive legal issues raised in habeas corpus petitions following the AEDPA amendment. *See, e.g., Bell v. Cone*, 122 S. Ct. 1843 (2002); *Penry v. Johnson*, 532 U.S. 782 (2001); *Ramdass v. Angelone*, 530 U.S. 156 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000); *Weeks v. Angelone*, 528 U.S. 225 (2000). This Court has addressed substantive issues of, *inter alia*, ineffective assistance of counsel and self-incrimination using recent post-AEDPA-amendment habeas cases as vehicles for those decisions. *See, e.g., Bell v. Cone*, 122 S. Ct. at 1850-52 (discussing *Strickland v. Washington*, 466 U.S. 688 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984) and their application to petitioner's ineffective-assistance-of-counsel claim); *Penry v. Johnson*, 532 U.S. at 793-96 (discussing *Estelle v. Smith*, 451 U.S. 454 (1981) and its application to petitioner's argument that admission of evidence violated his Fifth Amendment privilege against self-incrimination); *Williams v. Taylor*, 529 U.S. at 391-98 (discussing *Strickland* and other cases which the state court believed to have modified *Strickland*). Indeed, in *Penry v. Johnson*, *supra*, the question presented by the defendant/petitioner did not involve the "contrary to" or "unreasonable application" standards of 28 U.S.C. § 2254(d)(1), yet review was granted.* Certiorari

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* The questions presented in *Penry v. Johnson* were:

> (1) Was the trial court's submission to the jury of the same three "special issues" held to violate this defendant's constitutional rights in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), inconsistent with *Penry I* and other relevant constitutional rights in relevant decisions of this court?
>
> (2) May a psychiatrist appointed by the court on motion of defense counsel whose report is used as evidence for the prosecution be an "agent of the state" for purposes of the Fifth Amendment holding of

should likewise be granted here to resolve the admittedly important and recurring *Pearce* question presented in this case.

CONCLUSION

For these reasons, and those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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Estelle v. Smith, 451 U.S. 454 (1981)?

Petitioner's Brief, 2001 WL 237371 (Jan. 11, 2001).